

THE PROLIFERATION SECURITY INITIATIVE

Cornerstone of a New International Norm

Commander Joel A. Doolin, JAGC, U.S. Navy

Chemical, biological and nuclear weapons, along with ballistic missile technology,” are the means by which “small groups could attain a catastrophic power to strike great nations.”¹ Preventing terrorists from obtaining such weapons of mass destruction (WMD) has inspired a dramatic shift in U.S. strategy, from deterrence to preemption: “We must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge.”² The legal hurdles in the path of a preemptive strategy, however, were revealed by the *So San* incident of December 2002.

THE SO SAN INCIDENT AND THE PROLIFERATION SECURITY INITIATIVE

In late 2002 U.S. intelligence had collected evidence of money transfers from Yemen to North Korea. Satellite footage showed Scud fuel oxidizer being loaded into shipping containers. Analysts narrowed identification of the merchant vessel carrying the Scuds themselves to one of “three likely ships,” including the North Korean–flagged *So San*. That vessel was pinpointed because of two ac-

tions that might seem innocuous in themselves but were suspicious if taken together. First, it zigzagged; merchant vessels ordinarily follow a steady course on the rhumb line, the shortest track between two points on the globe. Second, the crew of *So San* lowered and raised the vessel’s flag; this is unusual, because the national ensign must be displayed continuously while under way.³

Commander Doolin is the Staff Judge Advocate for Carrier Strike Group 7. A former Surface Warfare Officer, he has earned an LLD degree (1993) from Catholic University and graduated with distinction from the Naval War College (2004). His essay “Operational Art for the Proliferation Security Initiative” won the Naval War College Foundation Prize in 2004.

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2006	2. REPORT TYPE		3. DATES COVERED 00-00-2006 to 00-00-2006		
4. TITLE AND SUBTITLE The Proliferation Security Initiative: Cornerstone of a New International Norm			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S)			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval War College, 686 Cushing Road, Newport, RI, 02841-1207			8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 29	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Surveillance of the ship in international waters of the Indian Ocean produced a legal basis for boarding—the fact that “So San” was freshly painted on the stern, the customary location for a ship’s name, whereas no vessel of that name was registered under the North Korean flag. That made the vessel “stateless” under international law, permitting U.S. warships to invoke a peacetime right to approach and visit.⁴ The master of the vessel declined to give consent for boarding and ignored warning shots; special operations forces rappelled aboard by helicopter to stop and search the vessel. The master claimed his cargo was cement, but the boarding team discovered fifteen Scud missiles.⁵ Dialogue between the United States and Yemen followed, fueling speculation that political considerations would reverse the interdiction: Yemen was a prospective partner in the war on terror, and escalation of tension with a nuclear-capable North Korea was to be avoided. Indeed, *So San* was allowed to proceed.

The situation is frustrating in operational terms. The U.S.-led maritime interdiction coalition had mastered the factors of time, space, and force; prompt intelligence had correctly identified a Scud carrier; warships had intercepted before it could deliver its cargo and had apprehended it with sufficient force. Yet there was no gain—the Scuds were permitted to arrive at their destination, due to the lack of legal power to seize them. Or was it the political will to argue there was, or should be, legal justification for seizure that was lacking? In the event, operational success, international law, and politics could not be synchronized, and so the interdiction failed.

Legal debate on the incident begins with the premise that proper authority in two respects must be present if maritime interdiction is to be effective. First, there must be authority to visit and search a particular vessel. This was satisfied in the *So San* case by its status as “stateless.” Second, there must be authority to seize, detain, or divert cargo found aboard. This did not exist here.⁶ Conventional missiles are not contraband subject to seizure. No United Nations resolution imposes a weapons embargo against Yemen. Neither North Korea nor Yemen are signatories to the Missile Technology Control Regime, which might have authorized seizure.⁷ Accordingly, there was no unquestionable legal authority to seize the Scuds.

The *So San* case illustrates the close intertwining of politics and international law. Less than a month before, the United Nations Security Council had passed Resolution 1441, giving Iraq a “final opportunity to comply with its disarmament obligations.”⁸ The decade-old embargo against Iraq was not used as authority to board *So San*, because its destination was clearly Yemen. Though USS *Cole* (DDG 67) had been in Aden, Yemen, when it was attacked two years earlier, the United States did not now make a self-defense claim. Arguments for seizing Yemeni ballistic missiles would have divided international political opinion on weapons of mass destruction precisely when solidarity was desired for a future

resolution authorizing “all necessary measures” to dismantle Iraqi programs. The price of solidarity was allowing Yemen to keep the Scuds and declining the opportunity to use *So San* as a precedent for interdiction of WMD on the high seas.

Five months later, the United States started to close the gap in international law through which *So San* had sailed. On 31 May 2003, President Bush launched the Proliferation Security Initiative (PSI) at a G-8 summit in Krakow, Poland. PSI “builds on efforts by the international community to prevent proliferation” of biological, chemical, and nuclear weapons, “their delivery systems, and related materials worldwide.”⁹

Over time, PSI will make seizure of weapons of mass destruction at sea an international norm. This article examines that component of PSI, in particular the inherent operational and legal issues.¹⁰ The operational factors of space, time, and force create strengths and weaknesses for WMD-interdiction operations; similarly, legal provisions relevant to WMD interdiction offer both utility and limitations. Analysis and supporting tables set forth legal options created by customary international law and treaty for interdiction at sea. The article offers specific recommendations to enhance operations, based upon what is legally feasible, with a focus on source countries and drug trafficking. The article then briefly discusses the advantages and challenges of using NATO architecture and combined exercises and deployments, as well as improved intelligence sharing among PSI participants, at the interagency and international levels.

THE FEW, THE RICH: THE PSI CORE MEMBERS

The United States and fifteen other nations are core members of PSI and participate in regularly scheduled meetings.¹¹ In September 2003, participating nations issued a “Statement of Interdiction Principles,” which call for the use of diplomatic, information, and military instruments of power. “More than sixty countries have signaled that they support PSI and are ready to participate in interdiction efforts.”¹²

PSI appeals to the common interest of states to support counterproliferation: secure borders uninterrupted by the catastrophic consequences of a WMD attack, with its human suffering and economic chaos. This is a strong mutual interest among the sixteen core members, which also have in common wealth, previous interest in counterproliferation, and existing security arrangements with the United States.

As table 1 shows, nine of the sixteen core members are G-8 or G-8/G-20* countries. All PSI core participants are signatories to the Biological Weapons

* The G-20, or Group of Twenty, established on 20 August 2003, focuses on agriculture. The members are developing countries: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Venezuela, and Zimbabwe. See *G-20*, www.g-20.mre.gov.br/index.asp.

TABLE 1
PSI CORE MEMBERSHIP PROFILE

	G-8/G-20	NATO	NSG	ZC	MTCR	WA	REMARKS
Australia	G-20	No	Yes	Yes	Yes	Yes	1
Canada	G-8/G-20	Yes	Yes	Yes	Yes	Yes	
Denmark		Yes	Yes	Yes	Yes	Yes	
France	G-8/G-20	Yes	Yes	Yes	Yes	Yes	2
Germany	G-8/G-20	Yes	Yes	Yes	Yes	Yes	
Italy	G-8/G-20	Yes	Yes	Yes	Yes	Yes	
Japan	G-8/G-20	No	Yes	Yes	Yes	Yes	3
Netherlands		Yes	Yes	Yes	Yes	Yes	
Norway		Yes	Yes	Yes	Yes	Yes	
Poland		Yes	Yes	Yes	Yes	Yes	
Portugal		Yes	Yes	Yes	Yes	Yes	
Singapore		No	Yes	Yes	No	Yes	4
Spain		Yes	Yes	Yes	Yes	Yes	
Turkey	G-20	Yes	Yes	Yes	Yes	Yes	
United Kingdom	G-8/G-20	Yes	Yes	Yes	Yes	Yes	
United States	G-8/G-20	Yes	Yes	Yes	Yes	Yes	

NPT = Nuclear Non-Proliferation Treaty
 NSG = Nuclear Suppliers Group
 MTCR = Missile Technology Control Regime
 WA = Wassenaar Arrangement

BWC = Biological Weapons Convention
 ZC = Zangger Committee
 CWC = Chemical Weapons Convention

Remarks:

1. Australia and the United States have a bilateral security treaty.
2. France is a signatory to the North Atlantic Treaty but not a member of NATO.
3. Japan and the United States have a bilateral security treaty.
4. Singapore is a host for U.S. military forces.

Convention (BWC), the Chemical Weapons Convention (CWC), and the Nuclear Non-Proliferation Treaty (NPT). Fifteen of the sixteen are also signatories to four other international agreements against WMD: the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG)*, the Wassenaar Arrangement (WA), and the Zangger Committee (ZC).¹³ Thirteen of the sixteen PSI core members are also NATO members. Two others, Australia and Japan, have bilateral security treaties with the United States. The sixteenth, Singapore, has cordial military relations with the United States and is strengthening them.¹⁴ These criteria constitute a potential formula for recruiting future PSI participants.

Table 2 identifies fourteen countries that support all seven WMD agreements but are not PSI core members. Ten more subscribe to at least four agreements,

* NSG, founded in 1974, is a forty-nation group that controls exports of nuclear weapons and nuclear-related items. WA, comprising thirty-three nations and founded in 1996, deals with the export of conventional armaments and dual-use technologies. ZC, with thirty-five nations, concentrates on aligning the Non-Proliferation Treaty with International Atomic Energy Agency (IAEA) export standards.

TABLE 2
MEMBERSHIP OF MAJOR WMD CONVENTIONS

	MTCR	BWC	CWC	NPT	NSG	ZC	WA	NATO/PfP
Argentina	•	•	•	•	•	•	•	
<i>Australia</i>	•	•	•	•	•	•	•	
Austria	•	•	•	•	•	•	•	PfP
Belarus		•	•	•				PfP
Belgium	•	•	•	•	•	•	•	NATO
Brazil	•	•	•	•	•			
Bulgaria		•	•	•	•	•		NATO
<i>Canada</i>	•	•	•	•	•	•	•	NATO
China		•	•	•	•			
Cyprus		•	•	•				
Czech Rep	•	•	•	•	•	•	•	NATO
<i>Denmark</i>	•	•	•	•	•	•	•	NATO
Finland	•	•	•	•	•	•	•	PfP
<i>France</i>	•	•	•	•	•	•	•	NATO
<i>Germany</i>	•	•	•	•	•	•	•	NATO
Greece	•	•	•	•	•	•	•	NATO
Hungary	•	•	•	•	•	•	•	NATO
Iceland	•	•	•	•				NATO
Ireland	•	•	•	•	•	•	•	PfP
<i>Italy</i>	•	•	•	•	•	•	•	NATO
<i>Japan</i>	•	•	•	•	•	•	•	
Kazakhstan			•	•			•	PfP
Latvia		•	•	•	•			NATO
Luxembourg	•	•	•	•	•	•	•	NATO
<i>Netherlands</i>	•	•	•	•	•	•	•	NATO
New Zealand		•	•	•	•		•	
<i>Norway</i>	•	•	•	•	•	•	•	NATO
Philippines		•	•	•				
<i>Poland</i>	•	•	•	•	•	•	•	NATO
<i>Portugal</i>	•	•	•	•	•	•	•	NATO
Romania		•	•	•	•	•	•	NATO
Russia	•	•	•	•	•	•	•	PfP
<i>Singapore</i>		•	•	•				
Slovakia		•	•	•	•	•	•	NATO
Slovenia		•	•	•	•	•		NATO
South Africa	•	•	•	•		•	•	
South Korea	•	•	•	•	•	•	•	
<i>Spain</i>	•	•	•	•	•	•	•	NATO
Sweden	•	•	•	•	•	•	•	PfP
Switzerland	•	•	•	•	•	•	•	PfP
<i>Turkey</i>	•	•	•	•	•	•	•	NATO
Ukraine	•	•	•	•	•	•	•	PfP
<i>United Kingdom</i>	•	•	•	•	•	•	•	NATO
<i>United States</i>	•	•	•	•	•	•	•	NATO
	[3]	[167]	[180]	[187]	[40]	[35]	[33]	[26/20]

Notes: Figures in brackets are the number of participants in each convention. PSI Core Members are italicized. Fourteen countries are signatories to all seven WMD agreements but are not yet in the PSI core: Argentina, Austria, Belgium, the Czech Republic, Finland, Greece, Hungary, Ireland, Luxembourg, Russia, South Korea, Sweden, Switzerland, and Ukraine.

including NPT, CWC, and BWC.¹⁵ Russia is the only G-8 member that is not a core PSI member, and it is a signatory to all seven WMD agreements. Argentina, South Africa, and South Korea are G-20 countries that support at least six WMD agreements and have good or improving security ties with the United States.¹⁶ Other G-20 members not in the PSI core are Brazil, China, India, Indonesia, Mexico, and Saudi Arabia. Saudi Arabia has the same characteristics as core member Singapore: military ties with the United States and signatory status for the three main WMD conventions. PSI nations account for 50 percent of NATO's members. Five NATO members and seven Partnership for Peace members (PfP) support all seven major WMD conventions but are not yet in the PSI core.¹⁷

Table 3 depicts the supermajority of United Nations members that support three major WMD conventions outlawing nuclear, chemical, and biological weapons. PSI builds upon this enormous political consensus. The next section argues that all PSI participants, core and noncore members alike, can use their collective sovereignty to achieve counterproliferation objectives.

HOW SOVEREIGNTY POWERS THE PROLIFERATION SECURITY INITIATIVE

Every nation that participates in PSI will apply resources of territory, airspace, waters, and laws to the coalition objective of nonproliferation. PSI interlinks the sovereign powers of many states by asking participants to follow four interdiction principles (the "PSI Principles").

- Interdict "chemical, biological or nuclear weapons, their delivery systems and related materials to and from states and non-state actors of proliferation concern."¹⁸
- Streamline procedures for the "rapid exchange of relevant information" concerning WMD proliferation.¹⁹
- Strengthen national legal authorities to accomplish the two objectives above.
- Prevent the transport of WMD within geographic areas and by vessels subject to their jurisdiction, by taking specific actions consistent with both their national and international laws.²⁰

Territorial Seas and Contiguous Zones. The PSI Principles further call on participants to take the following specific actions: refrain from transporting weapons of mass destruction; require vessels to undergo inspections as a condition of entry and departure; stop and search vessels that are reasonably suspected of carrying WMD cargoes at their ports, in internal waters, in territorial seas, and in contiguous zones; and seize WMD cargoes found.²¹

TABLE 3
CONVENTIONS AGAINST WMD

Year ^a	Convention	Participants ^b	Coverage
1968	NPT	187/191	Prohibits transfer of nuclear weapons, nuclear explosive devices, and items that would assist in the manufacture of nuclear weapons (NPT Art. 1)
1972	BWC	167/191	Prohibits microbial or other biological agents, or toxins and weapons, equipment or means of delivery (BWC Art. 1)
1974	NSG	040/191	Controls export of nuclear materials and equipment, including technologies applicable to peaceful uses, without International Atomic Energy Agency (IAEA) safeguards
1974	ZC	035/191	Harmonizes NPT with IAEA export requirements for special fissionable material and equipment for processing, use, or production of special fissionable material
1987	MTCR	033/191	Controls export of 300 km–range missiles capable of carrying a WMD payload and their essential technologies (MTCR)
1993	CWC	180/191	Prohibits a total of 19 chemicals and 28 precursors (CWC Schedules): <ul style="list-style-type: none"> • Eight highly toxic chemicals and four precursors • Three lethal chemicals and eleven precursors • Four toxic commercial chemicals and thirteen precursors • Three unscheduled discrete organic chemicals (phosphorus, sulfur, and fluorine)
1996	WA	033/191	Prevents destabilizing accumulations of seven types of conventional weapons, including missiles and missile systems, and three tiers of goods and technologies
2004	UNSCR ^c 1540		Criminalizes the proliferation of WMD and delivery systems to nonstate actors and for terrorist purposes

Notes:

a. Agreement reached and signatures begun.

b. Signatories and parties to the convention, regardless of ratification status, over the total United Nations (UN) membership (since 24 April 2003 there have been 191 members).

c. UN Security Council Resolution.

Under international law, a nation's sovereignty extends seaward twelve nautical miles from its baseline, forming a belt called the state's "territorial sea."²² In its territorial sea a nation enjoys law enforcement rights identical to those that it exercises on land within its borders. Ships "enjoy the right of innocent passage for the continuous and expeditious traversing" of a foreign territorial sea, but this right is not absolute.²³ The coastal nation may "take affirmative actions in its territorial sea to prevent passage that is not innocent, including, if necessary, the use of force."²⁴ The vessel conducting innocent passage is subject not only to the laws of the coastal nation but to the enforcement of those laws.²⁵ Accordingly, the coastal nation can approach, visit, and search any vessel in its territorial sea.

The next twelve miles can be declared by the coastal nation as a "contiguous zone," where the state is permitted to exercise its customs, fiscal, immigration, and sanitary laws.²⁶ Weapons of mass destruction are by definition dangerous materials, transportation of which must be consistent with customs laws. Thus,

every nation has the authority to prevent illegal WMD “imports” by enforcing its customs laws within twenty-four nautical miles of its coast. PSI leverages this national sovereignty to accomplish nonproliferation objectives.

Consent of the Flag Nation. The PSI Principles invoke national jurisdiction and authority over vessels flagged by that country, regardless of location. Participants agree to board and search any vessel flying their flags “beyond the territorial seas of any state,” either based upon a reasonable suspicion the vessel is carrying WMD “or at the request and good cause shown by another state”;²⁷ to “seriously consider providing consent” for other states to board and search vessels flying their flag;²⁸ and to seize WMD cargoes found pursuant to the two tasks above.

Nationality provides the legal basis for “same flag” boardings and for obtaining consent from flag nations to search their vessels in international waters. As codified by Articles 92 and 110 of the 1982 United Nations Law of the Sea Convention (UNCLOS*), warships and military aircraft have the peacetime right to approach and visit in international waters vessels of the “same nationality as the warship” or aircraft.²⁹ PSI participants also bring the sovereign power to authorize inspection by other countries of vessels flying their flags in international waters. The commercial fleets of six PSI core members are among the world’s fifteen largest, accounting for 12 percent of all merchant vessels.³⁰ Significantly, however, current PSI participants all together own only a fraction of the world’s merchant vessels.

Bilateral agreements under the PSI rubric between nations can produce rapid flag-nation consent for searches. Numerous bilateral agreements enable consent boardings in support of counternarcotics interdiction. Recently, the United States used this type of agreement as the model for the first bilateral agreements facilitating consent for WMD interdiction. Bilateral agreements between the United States and the flag nations of the two largest merchant fleets, Panama and Liberia, can in a matter of hours authorize boardings of suspect vessels by U.S. personnel in international waters to search for WMD cargoes. These bilateral agreements and others with Belize, Croatia, Cyprus, and the Marshall Islands raise the percentage of vessels accessible to consent boardings by PSI nations to well over half.³¹

The Air Picture. The PSI Principles ask participating nations to deny aircraft entry into their airspace or require transiting aircraft to land for inspection if there is a reasonable suspicion that their cargo includes weapons of mass destruction.³² These procedures are consistent with existing international law, under which national airspace extends seaward twelve nautical miles from the country’s

* So known, as a collective shorthand, for the Third UN Convention on the Law of the Sea, or UNCLOS III, 1973–82, at which the legal instruments were negotiated, formulated, and issued for signature.

baseline.³³ On the ground, nonmilitary aircraft of any nationality can be searched by the host nation.³⁴ States also have the right to refuse entry of foreign aircraft into their national airspace, unless that airspace is also an international strait or the state is party to an international agreement to the contrary.³⁵

The Peacetime Right of Approach and Visit. Vessels in international waters are generally immune from the jurisdiction of other nations. Stopping a vessel at sea means interfering with its fundamental right of freedom of navigation. Warships have the unique power to abridge free navigation by legally approaching and visiting vessels. During such an “approach and visit” the vessel’s master may consent to a search, but even a brief delay costs merchants time, inconvenience, and money. The extent of a warship’s power to “approach and visit,” then, depends on the situation.

In peacetime, the presumption is in favor of free navigation. As codified by the UNCLOS, warships may impede it only if there are reasonable grounds to suspect a vessel is engaged in one of six categories of illegal activity: piracy, slave trade, unauthorized broadcasting, operation without nationality, deception regarding nationality (if the vessel is actually of the same nationality as the warship), and illegal narcotics trafficking.³⁶

It is important to emphasize, with regard to operational planning, that the illegal-activity exceptions cannot be employed against the vast majority of legally registered vessels. Facts and circumstances will arise where an exception can be invoked, but only against particular vessels, not the entire fleet of that country. Under current international law, there is no authority to stop vessels on the high seas solely because of what they are suspected of transporting.

Authority to Seize WMD. The PSI Principles, however, presume that weapons of mass destruction are subject to seizure. This presumption is based on the reality, reflected in table 3, that the overwhelming majority of nations have signed treaties outlawing the proliferation of nuclear, chemical, and biological weapons. The United Nations has 191 member states. The Treaty on the Nonproliferation of Nuclear Weapons (NPT) has been accepted by over 188 of them, nearly the entire UN membership.³⁷ The Chemical Weapons Convention (CWC) has been signed by 180 nations. The Biological and Toxin Weapons Convention (BWC) has been accepted by 176 nations, over 87 percent of the UN membership.

Normally, a treaty binds only nations that agree to it. However, the doctrine of customary international law holds that a well established and widespread practice is evidence of the existence of a duty binding on all nations.³⁸ Accordingly, the NPT, CWC, and BWC are arguably enforceable against nonsigners. The implication for military operations would seem to be that seizure of WMD items found aboard foreign ships or aircraft may be authorized. The

counterargument is that no interpretation is permitted when the text of a treaty is clear—and none of the WMD or terrorism conventions authorizes maritime interdiction.³⁹ Each treaty was the product of negotiation by states, and subsequently changed security needs, however compelling, cannot add a right to maritime interdiction that does not exist in its language.

Conventional weapons, explosives, and ballistic missiles are not illegal *per se*. It is within the sovereign rights of nations to possess and transfer them, or to agree not to transfer them. Two initiatives against conventional weapons are the MTCR and the Wassenaar Arrangement. Both are supported by roughly the same plurality—thirty of the thirty-three signatories for MTCR and WA are identical.⁴⁰ Six other nations support either MTCR or WA but not both.⁴¹ The bottom line is that only 17 percent of the UN membership supports MTCR and WA, and less than 15 percent support both. Neither can be assumed customary; therefore, MTCR and WA are enforceable only against signatories, absent additional and specific authority against a nonsignatory.

HOW PSI CAN MASTER THE FACTORS OF SPACE, FORCE, AND TIME

International law provides a framework for operational design. The law empowers every nation that participates in PSI to conduct maritime interdiction operations (MIO) in its national waters and against its own vessels. Successful PSI military operations, however, will require unity of effort. The participation of many countries and their collective capability in command and control will determine what can be seized, where, and by whom. Intelligence services will be required to detect the production and shipment of potentially small WMD packages over enormous distances. Intelligence data can justify an “approach and visit” under one of the six UNCLOS exceptions for illegal activity; in rare cases, it may also reveal grounds for self-defense actions. The law, for its part, can fill in gaps when intelligence is incomplete, so long as the facts give reasonable grounds to suspect certain illegal activities. The link between intelligence and legal authority for maritime interdiction means that PSI nations need to enhance their awareness about vessels approaching their national waters.

The Factor of Space

PSI participants have the sovereign power to inspect any vessel or aircraft present in their territories, territorial seas and airspace, and to a lesser extent, in their contiguous zones. Making national space less porous to WMD transport is an enormous operational challenge. For example, the American coastline stretches ninety-eight thousand miles and includes “3.5 million square miles of ocean area” (that is, inside twelve nautical miles) and 185 deepwater ports.⁴² International trade involves at least a hundred thousand registered merchant vessels of a

hundred gross tons or more, flying the flags of two hundred countries.⁴³ Focus on the world's largest ports compresses the space problem. Sixteen “superports” handle 99 percent of the world's trade volume, and 90 percent of this volume passes through nine choke points.⁴⁴

By identifying major sources of weapons of mass destruction, intelligence can help operational planners prioritize counterproliferation efforts. Table 4 is an overview of WMD programs and terrorist presence in fourteen countries that have the most of each. Purchase and theft are presumably easier ways for terrorists to obtain WMD than developing their own. Large-scale production of weapons of mass destruction requires substantial facilities, as well as time and expense. Still, and although large programs are generally detectable by national intelligence networks, they cannot be detected with absolute reliability—as Saddam Hussein's WMD programs are a pointed reminder.⁴⁵ Further, modest quantities of biological or chemical weapons are fairly easy to produce, and the radioactive

TABLE 4
WMD THREAT MATRIX

Country ^a	Nuclear	Bio	CW	Missiles	Terror ^b	Remarks
North Korea	Y	Y	Y	Y	*	BWC, CWC, NPT, WMD negotiations
Iran	Y	Y	Y	Y	1*	BWC, CWC, NPT, WMD negotiations
China	Y	Y	Y	Y		BWC, CWC, NPT
Russia	Y	Y	Y	Y		BWC, CWC, NPT, MTCR
Syria		Y	Y	Y	*	WMD negotiations
Libya	Y	Y		Y	*	BWC, WMD negotiations
Pakistan	Y	Y		Y	5	BWC, CWC
India	Y	Y		Y		BWC, CWC
Israel	Y			Y	8	CWC
Vietnam			Y	Y		BWC, CWC, NPT
Sudan				Y	*	BWC, CWC, NPT, terror negotiations
Egypt				Y	2	BWC, NPT
Yemen				Y	1	BWC, CWC, NPT
Cuba				Y	*	BWC, CWC, NPT

Bio = biological weapons

CW = chemical weapons

Notes:

a. Omitted is Iraq, in the process of disarmament as a consequence of Operation IRAQI FREEDOM; and Afghanistan, whose sponsorship of terrorism was ended by ENDURING FREEDOM. Six other nations have at least one terrorist group but no WMD: Algeria, Colombia, Lebanon, Philippines, Turkey, and Uzbekistan. Britain and France, both nuclear powers, are not listed.

b. Number of known terrorist groups that operate in that country. Asterisk means the country was considered a state sponsor of terrorism in *National Strategy for Combating Terrorism* (2003).

Sources: Kenneth Katzman, *Terrorism: Near Eastern Groups and State Sponsors, 2001*, CRS Report to Congress (Washington, D.C.: Congressional Research Service, 10 September 2001); and James Fitzsimonds, “Weapons of Mass Destruction” (unpublished paper, Naval War College, Newport, R.I., 2000).

material needed to make a small but lethal “dirty bomb” (radiological dispersal device or RDD) could be obtained from more than “22,000 machines worldwide,” located at “hospitals, universities, factories, construction companies and laboratories.”⁴⁶ Therefore, table 4 is only the starting point for prioritizing WMD sources and potential threats.

Increase Participation in PSI. U.S. joint doctrine presumes that maritime interdiction operations have both military and political purposes.⁴⁷ The desired end state for PSI is elimination of WMD proliferation to the maximum extent possible. The political objective is to encourage proliferating nations to conform to PSI; the military objective is interdiction of weapons of mass destruction between source countries and terrorist organizations. International law, as we have seen, makes it easier for PSI participants to seize WMD in their own territorial seas and contiguous zones than on the high seas. PSI operations in national territory, water, and airspace enhance the legitimacy of the entire undertaking. The existence of a superport in a PSI nation accounts for a possible transit point for WMD shipments; a threat nation’s acceptance of PSI removes a proliferation source or recipient and adds space where PSI is followed. Compliance expands cooperation with PSI beyond the situations where international law permits military interdiction, and it permits assets to be devoted to other threats. Libya’s renunciation of WMD programs is a recent example.⁴⁸

Table 5 (which overlays threat data from table 4 with PSI participants, chokepoints, superports, and merchant ship registration) shows that current PSI participation produces favorable space-force relationships in NorthCom and EuCom but poor ones in CentCom and PaCom. Bilateral agreements for consent boardings, using the Liberia agreement as a model, with three more countries (the Bahamas, Greece, and Malta) will bring EuCom and NorthCom ship ratios to 100 percent. EuCom has many PSI partners to track threat nations, and PSI countries control all three superports in the theater; Russian participation in PSI would eliminate a WMD source. In CentCom, Egypt stands out, because that country controls the Suez Canal, one of the choke points. In PaCom, threat nations outnumber PSI partners, which account for less than a third of the superports. China is a decisive point in that region; it is a WMD source nation, has a superport, and owns a large merchant fleet. China, however, shares to some degree the interests of the PSI core nations in economic stability and nonproliferation.⁴⁹

Focus on WMD Source Countries. PSI targets a center of gravity for terrorist groups: their ability to receive weapons of mass destruction. Terrorist groups are numerous, covert, and mobile. It can be difficult to identify their lines of communication or predict where they could receive WMD. By contrast, countries have

TABLE 5
THE GEOGRAPHY OF PSI

Commander	PSI Nations	Threat Nations	Ratio ^a	Choke Points	Super Ports ^b	Ship Ratio ^c
CentCom	0	Egypt *Iran *Pakistan ^d Sudan Yemen	0:5	Strait of Hormuz Suez Canal	0 of 1	0:0
EuCom	Denmark, Neth., Spain, France, Norway, (Cyprus), ^f Turkey, Germany, Poland, U.K., Italy, Portugal, (Liberia) ^f	*Israel *Libya ^e *Syria *Russia	11:4	Dardanelles English Channel Strait of Gibraltar	3 of 3	5:7
NorthCom	U.S., Canada	Cuba	2:1	None	5 of 5	1:2
PaCom	Australia, (Marshall Is.), ^f Japan, Sing.	*China *India * N. Kor. *Vietnam	3:4	Straits of Malacca Taiwan Strait Tsushima Strait	2 of 7 ^g	2:4
SouthCom	(Panama) ^f	None	0:0	Panama Canal	1 of 1	1:1

Notes:

* Threat nations, major WMD sources.

a. Compares PSI and threat nations (as given in left columns).

b. Number of "super ports" in PSI nations versus the total number in the commander's area of responsibility.

c. Number of largest merchant fleets under PSI flags versus the total number in the commander's area of responsibility. Those PSI countries are: Singapore, Norway, U.S., Japan, Italy, and Germany. Nations with the largest vessel registries are also grouped by AOR: EuCom—Greece, Malta, Cyprus; NorthCom—Bahamas; PaCom—China, Marshall Islands; SouthCom—Panama.

d. Pakistan is investigating and has denounced alleged transfers of atomic program information to Iran.

e. Libya has recently renounced its WMD programs, making the ratio even more favorable in EuCom.

f. Bilateral agreement with the United States.

g. Taiwanese cooperation in detaining in Kaohsiung Harbor the North Korean vessel *Be Gaehung*, which was carrying chemical precursors.

Sources: "General Denies Letting Secrets of A-Bomb out of Pakistan," *New York Times*, 27 January 2004, p. A6; "Libya: No More Weapons of Mass Destruction," *Newport Daily News*, 20–21 December 2003, sec. 1, p. 1; "Ship's Seizure Sends Signal to North Korea," *Christian Science Monitor*, 12 August 2003; U.S. Transportation Dept., *MARAD 2001: Maritime Administration's Annual Report to Congress* (Washington, D.C.: Maritime Administration, 2001), p. 41.

fixed seaports, and most countries value their economic and political relationships with the international community. The fact that major WMD sources are countries, then, is a critical vulnerability for terrorists. Combatant commanders can, therefore, in their theater security cooperation plans consider WMD source countries as critical vulnerabilities of terrorists and synchronize military interdiction with political, economic, and information instruments.

Stop Drug Money That Buys WMD. Drug trafficking produces "vast sums of money for international organized crime syndicates and terrorist organizations."⁵⁰ Diminishing drug traffic that funds terrorist groups impairs their ability to purchase or develop WMD. International law makes this connection a critical vulnerability—PSI nations may legally conduct interdiction operations on the high seas against suspected drug traffickers. Counterdrug operations can harm terrorist networks while observing the principles of legitimacy and restraint.

In the peacetime legal framework, operational commanders have discretion as to how often to approach and visit vessels. A risk-averse option is to approach and visit only when there is tangible evidence about a particular vessel, such as intelligence that narcotics were loaded as cargo. A more assertive concept uses the 1982 UNCLOS standard of “reasonable grounds.”⁵¹ The facts that a vessel is visibly low in the water and is on a possible drug route would permit the inference that it may be engaged in drug trafficking.

The Factor of Force

Each PSI participant brings forces to counterproliferation, of varying size and quality. These forces collectively have a critical weakness and a critical strength in concentrating to detect and intercept a WMD carrier. The weakness is that they simply cannot be everywhere at once. Thus, it is necessary to achieve information superiority and exercise command and control to focus PSI forces and surveillance assets where they are required. This task is made easier by the fact that U.S. sea-based forces are routinely positioned ninety-six hours away from major shipping routes.⁵²

The critical strength PSI forces enjoy is that when a threat is detected, participants can muster sufficient force to overpower any potential WMD carrier. The typical scenario is of a warship or one of its small boats approaching an unarmed or lightly armed vessel. In most cases the ship receives the master’s consent to board and search. Gunfire is usually not required; should a forcible boarding be necessary, however, the warship can disable the vessel with its own weapons or send an embarked “visit board search seize team” (VBSST) to take control of it. The capabilities of a VBSST, of naval or Coast Guard personnel, would usually be sufficient to deal with an unarmed or lightly armed crew. If not, Marines or special operations forces could be requested from the combatant commander. Once aboard, a VBSST can face a difficult task if the crew, even if unresisting, does not actively aid the search. Ships have hundreds of compartments. Voids and tanks can go undetected if welded shut. On board a large container ship, the contents of perhaps thousands of sealed containers, each the size of a truck trailer, are described by lengthy bills of lading, which must be carefully examined. These realities require proficient and properly equipped VBSST, especially since WMD contraband may be very small.⁵³

Use NATO Architecture for Large-Scale Exercises with PSI Nations. Thirteen of the current PSI participants are also NATO members.⁵⁴ This heavy proportion of NATO countries yields operational advantages for the Proliferation Security Initiative—the NATO command structure, rules of engagement (ROE), and information assurance agreements can (and should) be used for PSI operations.⁵⁵ In this way valuable time can be saved, and new PSI members incorporated

more easily. Operations with non-NATO teammates will require the use of standardization agreements for information assurance—that is, the protection of NATO-classified material.⁵⁶ NATO rules of engagement can be “sanitized” to safeguard them from compromise. The NATO standardization agreement can also be the basis for memoranda of understanding with appropriate foreign agencies, to foster the sharing of intelligence on WMD matters throughout the PSI membership.

Continue Combined Exercises and Deployments. On PSI’s second anniversary, its leaders boasted that “over 40 countries have participated in fourteen training exercises.”⁵⁷ Command and control is critical if PSI participants are to focus surveillance assets and determine where interdiction is required. Mastery of it will leverage their advantage in force and facilitate unity of effort. The tasks of command and control, communicating and disseminating, and using intelligence for large-scale maritime interdiction operations must be exercised in order to make forces ready for contingencies. Combined exercises and deployments will allow PSI participants to practice these skills; determine tactics, techniques, and procedures for the host of operational and legal issues that would arise from actual WMD seizures; and validate planning for UN-sanctioned actions against WMD source countries.⁵⁸

Multinational warships on PSI taskings could be deployed with U.S. strike groups. Deployment of a foreign warship on a regular basis with a battle group would enhance its capabilities for PSI operations. A warship from another nation brings that nation’s sovereign power for “same flag” boardings. Many navies have law enforcement authority in their nations’ contiguous zones and territorial seas, expanding the potential area of operations. Further, such combined deployments would test the integration of command and control in varied environments and over extended periods.⁵⁹

When the United States hosts PSI exercises, inclusion of the Coast Guard would repair a seam between the American sea services. The Coast Guard has law enforcement authority and is the lead federal agency for interdiction in U.S. territorial seas and contiguous zones; the Navy has more surveillance assets but no law enforcement authority. Any American response to a shipment of WMD toward the homeland would likely involve both services. Exercises are needed, therefore, to test contingency planning for Navy–Coast Guard interdiction of WMD.

Share Intelligence among PSI Participants. The peacetime justifications for interdiction on the high seas, based on the six kinds of illegal activities enumerated above, highlight the relationship between intelligence and legal authority. If operational commanders have evidence of a vessel’s illegal activity or the threat of an imminent attack, legal justification for interdiction may be possible.

Interagency and international resources can improve awareness concerning WMD movements and the effectiveness of searches. Sharing intelligence among the armed forces and civilian agencies of PSI countries about WMD shipments will further promote unity of effort.

Use Interagency Resources. Each combatant commander has an intelligence team, including interagency professionals, that can tap into the national structure that monitors WMD activities. “Critical information requirements” to support PSI operations are different from traditional concentration on an enemy’s order of battle. Data is needed on merchant vessels, storage capabilities, and normal operations. Maritime shipping expertise is required to decipher bills of lading. It may not be possible to add maritime shipping experts to combatant commanders’ staffs, but liaison with them is essential. American customs inspectors and the Coast Guard foreign port liaison officers are other resources for critical intelligence or training. The Coast Guard has four “maritime safety and security teams” (MSSTs), of approximately a hundred active-duty and reserve personnel each, that protect domestic ports in the homeland. One MSST specialty is WMD detection.⁶⁰ If maritime agency resources and maritime training safety and security teams were tapped to train VBSST, improvement in the ability to detect weapons of mass destruction on board merchant vessels would almost certainly result. In such ways, interagency cooperation can bring new knowledge and state-of-the-art procedures to shipboard searches.

Use International Resources. The State Department is the lead agency for international law enforcement academies (ILEA), which, with the departments of Justice and Treasury as partners, have “trained over 8,000 officials from 50 countries.”⁶¹ Alumni of these academies represent a potentially valuable pool of international talent, on which defense attachés could call for answers about a nation’s maritime companies and procedures. International law enforcement academy graduates might assist combatant commanders’ staffs as liaison or interpreters to increase the effectiveness of shipboard searches.

The Factor of Time

As we have seen, no counterproliferation convention has created the right to interdict the shipment of weapons of mass destruction on the high seas. Under some circumstances, however, international law permits interdiction of WMD and conventional weapons in international waters without consent of the flag nation. With such authority PSI nations would not have to wait until the vessel entered their contiguous zones and make the interdiction in that narrow area. There are three possibilities. First, during armed conflicts belligerent warships can “visit” merchant vessels in international waters to search for contraband. Second, the Security Council can authorize an arms embargo as a

“partial interruption of economic relations” against a member state and enforce it with a “blockade.”⁶² Finally, and precariously, the inherent right of self-defense may authorize interdiction. Each of these legal avenues has political requirements and risks.

Do Not Invoke the Belligerent Power Universally. The United States does not in general claim belligerent status in the global war on terrorism to “visit and search,” but some military operations under that rubric qualify as armed conflicts under international law; current examples include operations IRAQI FREEDOM and ENDURING FREEDOM. Broader belligerent status would require an enabling resolution or formal declaration of war by the Congress. Aside from the political issue of mustering domestic support, the legal issue would be whom or what to declare war against. Traditional practice assumes that one state declares war on another state, putting all on notice that, *inter alia*, the declaring state intends to exercise the wartime power of visit and search. This is impractical against a stateless threat. To cover all flag nations that might be a host for al-Qa‘ida cargo the United States would have to declare itself in at least a technical state of belligerence against at least eleven countries that the 9/11 Commission lists as potential sanctuaries.⁶³ (The commission itself recommended instead garnering support for PSI.)⁶⁴ It would be far better policy to reserve the belligerent right of visit and search to cases of actual armed conflict.

Use Security Council Resolution 1540 to Request Flag-Nation Consent. Resolutions of the Security Council can authorize maritime interdiction. This authority is reactive, not preventive, in that the state must have committed acts justifying the resolution. Often it is embodied in two resolutions, one for the embargo and the second for maritime interdiction operations to enforce the embargo.⁶⁵ Again, this power has always been exercised against states, making it legally and politically difficult to obtain specific authority against a country simply because it is perceived as a WMD threat, and there is no standing resolution to authorize interdiction at sea to enforce WMD conventions.

However, UN Security Council Resolution 1540 of 28 April 2004 imposes a duty on all member states to “refrain from providing any form of support to non-State actors,” including weapons of mass destruction and delivery systems, such as missiles.⁶⁶ Its rationale was to correct a “gap” in international law regarding nonstate actors.⁶⁷

Resolution 1540 received unanimous support, even from countries that had opposed American preemptive action against Iraq—China, France, Germany, and Russia. Also significant was the fact that Spain’s support was unaffected by the 11 March 2004 terrorist attacks in Madrid. Two of the four PSI Principles are imbedded in Resolution 1540. In language similar to PSI Principle 1, pledging

interdiction, UNSCR 1540 calls on states to “detect, deter, prevent and combat” illicit WMD trafficking within their own borders.⁶⁸ PSI Principle 3 (strengthen national legal authorities for counterproliferation) becomes a requirement that states make and enforce domestic laws prohibiting WMD acquisition and possession “for terrorist purposes.”⁶⁹

Resolution 1540, though it added no maritime interdiction authority, can be cited as the legal basis to persuade a flag state to cooperate with counterproliferation activities. At sea, that means it should “seriously consider providing consent” for vessel searches if there is a reasonable suspicion that WMD cargo is aboard.⁷⁰

Use Article 51 Selectively as a Trump Card. Article 51 of the United Nations Charter refers to actual “armed attack” as the threshold for national self-defense. The article is incorporated by reference into numerous security agreements.⁷¹ It cannot be invoked merely to restrict the growth of an opponent’s capabilities, because actions in self-defense must be consistent with the international principles of necessity and proportionality. Article 51 may be thought of as a trump card that can be played only when a threat becomes an imminent attack.

The status in law of maritime interdiction as a measure of “anticipatory” self-defense has historical roots. On 29 December 1837, the American steam vessel *Caroline* was burned in U.S. waters by the British, who suspected the ship was carrying arms to Canadians engaged in rebellion.⁷² The case is frequently cited as the basis for the legal elements of anticipatory self-defense (which the British did not follow regarding *Caroline*): “(a) its exercise must be in response to actual or threatened violence, (b) the actual or threatened violence must create an instant and overwhelming necessity to respond, and (c) the self-defense measures taken must not be excessive or unreasonable in relation to the threat.”⁷³ Scholars debate whether this doctrine was codified or eradicated by Article 51, and how much of it still has force.⁷⁴

Like the rest of the UN Charter, Article 51 was devised to govern affairs between states, an arena where deterrence can be a useful tool. Article 51 is insurance when deterrence fails, authorizing force in self-defense in response to attack until the Security Council acts to remedy the matter. The UN Charter outlaws preventive attacks between states, such as those committed by Nazi Germany and imperial Japan. The Security Council has authorized military intervention on two occasions in response to territorial invasion by one state upon another, reversing the invasion of South Korea in 1950 and of Kuwait in 1990. But lack of unanimity among the permanent five members paralyzes the Security Council, as evidenced by its inaction following the report by the United States of the Soviet Union’s shipment of nuclear missiles to Cuba in 1962.⁷⁵

The Cuban missile crisis in 1962 illustrates how the combination of resolve, diplomacy with regional allies, and seapower can interdict weapons of mass destruction. Although the Security Council did not act on the American charge that the Soviets were transporting WMD, the Organ of Consultation of the American Republics, convened by the Organization of American States, resolved to ensure that Cuba did not receive them. This resolution, which did not rely upon Article 51, was the legal basis cited in President John F. Kennedy's proclamation of a defensive quarantine.⁷⁶ A brief look at the legal reasoning in that case demonstrates, however, that interdiction of weapons of mass destruction in international waters is consistent with state obligations under the UN Charter.

The United States, as we have seen, did not invoke Article 51 or the wartime doctrine of blockade to justify the "quarantine."⁷⁷ Rather, it used as its legal basis the 1947 Rio Pact, which provided for the collective security of the Western Hemisphere, using the Article 51 standard.⁷⁸ The United States was obliged to interdict the Soviet weapons on its own because its report to the Security Council was not acted upon. However, the Rio Pact, to which it appealed, incorporates the Article 51 standard in its own Article 3. Further, President Kennedy's Proclamation 3504 of 23 October declared that interdiction of offensive weapons and materials, conventional missiles as well as nuclear materials, would be conducted at a "reasonable distance from Cuba" and along "prescribed routes" to that country.⁷⁹ Also, the military force employed was proportional to the threat, in that it was directed against ships carrying weapons to Cuba. The decision represented the use of minimum force and caused the briefest possible interruption of other nations' right to free navigation. It is clear, then—especially in light of the alternatives, destroying the vessels or attacking deployed weapons systems—that the quarantine was consistent with U.S. responsibilities under the UN Charter.⁸⁰ The interdiction has stood as a permissible measure for over forty years and is cited today as a valid precedent.⁸¹

Other recent examples are available. Israel and Spain have each conducted at least one interdiction of a conventional weapons shipment in international waters, apparently without censure. On 3 January 2002, Israel, in Operation NOAH'S ARK, captured in the Red Sea *Karine-A*, a Palestinian Authority freighter. The vessel's cargo included twelve-mile-range Katyusha rockets, antitank missiles, and high explosives.⁸² In July 2003, Spain seized a South Korean vessel navigating the high seas toward Senegal to deliver a shipment of conventional arms.⁸³ Neither action was condemned by the Security Council.

Preemptive action in self-defense lowers military risk, but it does so by raising political risks, as demonstrated in the U.S. quarantine of Cuba in 1962. There are numerous other historical examples where the interdiction of vessels at sea raised political tensions among states or contributed to the outbreak of war.⁸⁴

Universal condemnation of weapons of mass destruction and terrorism cannot be used as justification for the violation of another state's sovereignty. Intercepting aircraft in foreign airspace without the host nation's express consent risks adverse international reaction, as Israel learned in 1973 when it intercepted an aircraft in Lebanese airspace that it believed to carry a Palestinian responsible for a hijacking; the Security Council condemned Israel's action in Resolution 337. It was for that reason that the United States did not claim jurisdiction over the *Achille Lauro* hijackers whom it captured by diverting an Egyptian aircraft in Sicilian airspace.⁸⁵ In 1981, UNSCR 487 condemned an Israeli attack on an Iraqi reactor.⁸⁶ The record, then, confirms that while some states have interdicted weapons shipments on the high seas without sanction, these instances were exceptions and not the general rule. Therefore, states take a political risk if they do so; the prudent approach is to use Article 51 sparingly—only when it can be justified with compelling facts.

National self-defense could be used to justify maritime interdiction if the facts established that the transport of weapons of mass destruction toward the coastal nation constituted an imminent threat of armed attack. If the United States learned, for instance, that WMD was being transported illegally toward its shores aboard a vessel capable of releasing the payload during transit, the imminence of armed attack could be inferred. The release of biological or chemical weapons in a territorial sea would risk damage to vessels and islands within that territorial sea, as well as parts of an exclusive economic zone (discussed below) and even the mainland. Detonation of a nuclear device could easily do damage within the twenty-four-mile radius embracing the territorial sea and contiguous zone. Interdiction on the high seas would therefore be justified as both necessary to prevent the attack and proportional to the threat. National self-defense, as formally defined by the United States, could be invoked under such circumstances.⁸⁷

ESTABLISHING THE RIGHT TO SEIZE WMD ON THE HIGH SEAS

Stopping a vessel at sea means interfering with a fundamental right, that of freedom of navigation. Yet this right is not absolute. A coastal state's interest in law enforcement can overcome another country's right to unmolested freedom of navigation. Contiguous zones are international waters, but they are subject to the laws of the coastal state in situations constituting "hot pursuit."⁸⁸ The balance of interests twenty-four miles from sovereign territory has been conclusively presumed to be in favor of the coastal nation. There is no distinction between a point mere yards past the territorial sea and one twenty-four nautical miles from the baseline, the outer range of the contiguous zone—both are in international waters, and the coastal nation has equal power at either.

Even beyond the contiguous zone, international law gives a coastal nation influence over foreign vessels, if it has an exclusive economic zone (EEZ). In its EEZ, which would extend as far as two hundred nautical miles from its baseline, the state has jurisdiction over the scientific exploration, economic exploitation, and environmental management and conservation.⁸⁹ The legal regime of the EEZ expresses another balancing of interests, the upshot of which is that the state may interfere with free navigation far from its coast. The paradox is that in the EEZ the permissible reasons for interrupting free navigation are of less gravity than in the contiguous zone, though the EEZ is a much larger expanse of sea and extends farther out. Here it is economic reasons that justify intrusion; those of law enforcement stop at the twenty-four-mile line.

Yet as we have seen, international law permits some temporary interference with the right of free navigation well out on the high seas. Warships have a unique, but limited, right to abridge free navigation by approaching and visiting vessels anywhere, if the situation justifies the expense and inconvenience for the owner. In peacetime, the balance heavily favors freedom of navigation. In accordance with Article 110 of the 1982 UNCLOS agreement, warships may impede a vessel without regard to proximity to the coast only if there is reason to suspect that it is engaged in one of six categories of illegal activity.⁹⁰

Each of these six exceptional categories was part of international practice before codification in the law of the sea. Each expresses a rule for the balancing of interests between coastal states and a transiting nation's freedom of navigation. All six accept the interruption of navigation as a trade-off for enforcement of the law. Without them, piracy, illegal broadcasting, and trafficking in narcotics or slavery would have safe havens in the world's oceans. All nations that respect and depend upon laws to maintain peace and security benefit from UNCLOS Article 110. One hundred forty-five nations have ratified UNCLOS, while other nations observe it as a matter of policy.⁹¹ There is widespread recognition, then, that the law enforcement interest of a state can trump the right to freedom of navigation in some circumstances. Conventions against weapons of mass destruction carry even wider international support.⁹²

National legislation reaches into international waters. The United Kingdom prosecutes piracy on the basis of its 1688 antipiracy and illegal-privateering statute.⁹³ The U.S. Congress has also made law reaching the high seas: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."⁹⁴ National legislation could be passed to interdict WMD and terrorists in international waters. The state interest in doing so is easily argued; states already legislate against criminal operations on the high seas—pirates and drug/slave traders. Where such criminals could harm individuals and small groups,

terrorists, especially if armed with weapons of mass destruction, threaten much larger numbers of people. Interdiction on the high seas would clearly aid the enforcement of international conventions prohibiting WMD proliferation; failure to permit interdiction would render the conventions unenforceable.

But the remedy is amendment, not reinterpretation. The UNCLOS exception categories emerged for specific historical reasons. Many elements of the law of the sea began as domestic laws, and some had been taken up in treaties prior to UNCLOS. Specific treaties created duties or granted rights between states on the high seas. Some of these, over time, became customs, the original documents forgotten, only to be recodified in later treaties, including the 1982 convention, which constituted written recognition of norms, uniform rules for their practice, and notice to other countries. UNCLOS Article 110, then, cannot be read collectively as a universal endorsement of “approach and visit,” as a single principle justifying interruptions of navigation for reasons not enumerated.⁹⁵

BUILDING A NEW INTERNATIONAL NORM

So San showed that international law and politics can be decisive in the outcome of maritime interdiction. PSI participants have legal authority to visit and search vessels in their territories, territorial seas and airspace, and, to a lesser extent, their contiguous zones. In international waters, warships can visit and search merchant vessels flying their countries’ flags.

Existing legal authority makes it easier to seize weapons of mass destruction than other items that would strengthen terrorist groups, such as ballistic missiles or conventional weapons. Biological, chemical, and nuclear weapons are almost universally seen as “contraband” and so are arguably subject to seizure, which, say, ballistic missiles would not be. Resolutions of the Security Council and considerations of belligerence and self-defense can authorize maritime interdiction in unusual circumstances. But their legal underpinnings make them reactive in nature and unsuited to a preventive strategy that requires broad international support. The 1982 UNCLOS convention offers only a patchwork of authority, exceptions to the right of free navigation. These exceptions, however, grew out of domestic law and treaties, codified after years of practice in the suppression of internationally condemned activities into accepted reasons for warships to approach and visit vessels on the ocean. The Proliferation Security Initiative may represent the birth of a new such exception, by which, over time, the combination of law and seapower may close the oceans as a safe haven for proliferators of weapons of mass destruction.

PSI activities, exercises, and operations will make maritime searches for WMD more common, the first steps toward a change in international practice. PSI will slowly change customary international law as more countries accept the

boarding of vessels on the high seas to search for weapons of mass destruction. Security Council Resolution 1540 and bilateral agreements will strengthen this evolution. It might be possible to negotiate a multinational instrument more quickly than separate bilateral agreements with the over two hundred nations that register merchant vessels. The supermajority of nations that already support WMD conventions could amend UNCLOS Article 110 to include trafficking in weapons of mass destruction as a reason for a warship to approach and visit another state's vessel in international waters. Perhaps such an amendment would finally win U.S. Senate ratification, which has been pending since 1994, for the 1982 UNCLOS agreement as a whole. But even absent such an overarching instrument in the short term, the proliferation of bilateral agreements granting the right to approach and visit vessels on the high seas to search for WMD will steadily increase the number of countries accepting this practice, gradually establishing it as an international norm and then as creating a perceived duty, a matter of customary law. Ultimately the effect would be the same: codification in an amendment to Article 110 to the 1982 law of the sea agreement, making international recognition of the customary duty explicit and the rules for its practice uniform. Reasonable suspicion that a vessel is carrying cargo or terrorists associated with WMD would then be one of the formally enumerated reasons for interrupting the freedom of navigation on the high seas.

The journey from custom to codification must be intertwined with politics. If the warning of the *So San* case has been heard, the nations participating in the Proliferation Security Initiative will, in one way or the other, obtain "fast-track authority" for maritime interdiction to enforce counterproliferation on the high seas, as they do now in coastal waters. If it has not been heard, the international community may wait for a seaborne WMD attack by terrorists before putting pen to paper.

NOTES

1. *National Security Strategy for the United States* (Washington, D.C.: White House, September 2002), p. 13.
2. U.S. State Dept., *National Strategy for Combating Terrorism* (Washington, D.C.: February 2003) [hereafter NSCT], p. 11, quoting President Bush.
3. Article 92 of the United Nations Convention on the Law of the Sea, 1982 [hereafter UNCLOS], codifies the rule about maintaining nationality while under way.
4. UNCLOS, article 110, codifies this authority.
5. The narrative is based upon three news accounts: Carla A. Robbins, "Why U.S. Gave UN No Role in Plan to Halt Arms Ships," *Wall Street Journal*, 21 October 2003, p. 1; Jong-Heon Lee, "North Korea: Ship Interception 'Piracy,'" *Washington Times*, 13 December 2002, dynamic.washtimes.com; and "Yemen Claims Scuds, Protests to U.S.," MSNBC.com, 11 December 2002.

6. Professor Ruth Wedgewood has opined that seizure of piracy cargo—or alternatively, Yemen's previous written "pledge" not to import Scuds—should have justified confiscation. See Ruth Wedgewood, "A Pirate Is a Pirate," *Wall Street Journal*, 16 December 2003. These arguments are tempting but easily countered. There was no evidence *So San* was involved with piracy, and the facts leading to its "stateless" categorization justified boarding and search only. Treaties or consent at the time of seizure are the usual standards for impressing cargo.
7. U.S. State Dept., *Fact Sheet on Missile Technology Control Regime* (Washington, D.C.: Bureau of Nonproliferation, 9 October 2001), available at www.state.gov/t/np/rls/fs/2001/5340.htm.
8. United Nations Security Council Resolution [hereafter UNSCR] 1441, 8 November 2002.
9. U.S. State Dept., *Statement of Interdiction Principles* (Washington, D.C.: Bureau of Nonproliferation, 4 September 2003), available at www.state.gov/t/np/rls/fs/23764.htm. The Group of Eight was established in October 1975 to facilitate economic cooperation among the developed countries that had participated in the Conference on International Economic Cooperation, held between December 1975 and 3 June 1977. Its members are Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. See *CIA World Factbook*, www.cia.gov/cia/publications/factbook/index.html.
10. The current Unified Command Plan makes combatant commanders "the single DOD point of contact within the assigned geographic AOR [area of responsibility] for countering the proliferation of weapons of mass destruction in support of non-proliferation policies, activities and tasking." U.S. Defense Dept., *Unified Command Plan* (Washington, D.C.: 30 April 2002), para. 12j.
11. As of the original announcement of PSI, there were eleven participating nations: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. By 17 December 2003, there were five additional countries: Canada, Denmark, Norway, Singapore, and Turkey. The five initial meetings of the core PSI membership were in Madrid, June 2003; Brisbane, July 2003; Paris, September 2003; London, October 2003; and Washington, D.C., December 2003. U.S. State Dept., *Nuclear Weapons and Rogue States: Challenge and Response* (Washington, D.C.: Bureau of Nonproliferation, 2 December 2003), available at www.state.gov/t/us/rm/26786pf.htm.
12. Under Secretary of State John R. Bolton, testimony before the House International Relations Committee, 30 March 2004. The Statement of Interdiction Principles may be found on the State Department website, www.state.gov.
13. The remaining member, Singapore, is party to only BWC, CWC, and NPT. Table 3 describes each, and table 2 lists the membership.
14. Notably, Singapore offered to host U.S. Marine antiterrorist patrols in the Straits of Malacca. "U.S. Plans to Deploy Marines in Southeast Asian Waterway," *Agence France-Presse*, 5 April 2004.
15. The fourteen countries are listed on table 2. The three countries that support six of the major conventions are Bulgaria, Slovakia, and South Africa. Seven countries support BWC, CWC, and NPT plus only one of the four other conventions: Belarus, Brazil, China, Cyprus, Iceland, Kazakhstan, and Latvia. New Zealand supports MTCR, NSG, and WA but not ZC.
16. Argentina recently deployed a warship with the USS *Enterprise* (CVN 65) battle group. Jack Dorsey, "Navy Developing Plans to Deploy, Train Overseas with Foreign Fleets," *Virginian Pilot*, 15 August 2003. Last year, South Africa received three million dollars in anticrime and antiterrorism funding and \$1.2 million in International Military Education and Training (IMET). U.S. State Dept., *Fact Sheet: U.S. Assistance to South Africa* (Washington, D.C.: 3 September 2002).
17. The five NATO members are Belgium, the Czech Republic, Greece, Hungary, and Luxembourg. The seven PfP countries are Austria, Finland, Ireland, Russia, Sweden, Switzerland, and Ukraine. Another NATO member, Iceland, is a signatory to four of the seven major WMD conventions. Three PfP members—Finland, Switzerland, and Sweden—have pledged funding toward the G-8 global partnership "to commit up to \$20

- billion to a global partnership against proliferation” (*National Security Strategy*, p. 14). Russia is a beneficiary of this G-8 program. *Fact Sheet: Broadening the Partnership to Stop the Spread of Weapons of Mass Destruction* (Washington, D.C.: White House, 2 June 2003).
18. Statement of Interdiction Principles.
 19. *Ibid.*, Interdiction Principle 2.
 20. *Ibid.* Interdiction Principle 4 itemizes the specific actions, which are discussed below.
 21. *Ibid.*
 22. UNCLOS, arts. 1, 2, reprinted in *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (Newport, R.I.: Naval War College, International Law Dept., 1997), para. 1.4.2.
 23. *Annotated Supplement*, para. 2.3.2.1; UNCLOS, arts. 17–21.
 24. *Ibid.*
 25. UNCLOS, arts. 21(1), 21(4); *Annotated Supplement*, para. 2.3.2.1.
 26. UNCLOS, art. 33; *Annotated Supplement*, para. 2.4.1.
 27. Statement of Interdiction Principles, Interdiction Principle 4b.
 28. Statement of Interdiction Principles, Interdiction Principle 4c.
 29. UNCLOS, art. 110 [emphasis supplied]. Article 92 establishes the flag nation’s exclusive jurisdiction, while Article 110 codifies a warship’s right to approach and visit. Text of the convention, by article, is available at www.globelaw.com/LawSea/lscnts.htm.
 30. The statistics about world shipping registries use 2001 data. In that year, the following nations, which are now PSI members, registered the largest merchant fleets: Singapore, Norway, the United States, Japan, Italy, and Germany. U.S. Transportation Dept., *MARAD 2001: Maritime Administration’s Annual Report to Congress* (Washington, D.C.: Maritime Administration, 2001), p. 41.
 31. U.S. State Dept., “Proliferation Security Initiative Ship Boarding Agreement Signed with Liberia,” 12 February 2004, available at www.state.gov/r/pa/prs/ps/2004/29338pf.htm. Agreements identical to the U.S.-Liberia bilateral agreement were signed with Panama and the Marshall Islands on 12 May and 13 August 2004, respectively. In 2005, the United States signed agreements with Croatia (1 June), Cyprus (25 July), and Belize (4 August). The six PSI nations with the largest fleets registered a total of 3,661 vessels; Liberia had the second-largest shipping registry, with 1,735 vessels. The six PSI nations and Liberia accounted for 5,396 registrations of the worldwide total of 30,293, or 17.8 percent. Panama flagged 5,120 vessels in 2001, making it the largest registry. Its participation as a PSI nation nearly doubles the number of vessels available for consent boardings and raises the fraction of the world’s merchant ships accessible to the PSI coalition to 34 percent. No data was available from *MARAD 2001* on the size of merchant fleets for the other ten PSI nations.
 32. Both prongs are taken from Statement of Interdiction Principles, Interdiction Principle 4e.
 33. UNCLOS, art. 2; *Annotated Supplement*, paras. 1.8, 2.5.1.
 34. Convention on International Civil Aviation (1944) (“The Chicago Convention”); *Annotated Supplement*, paras. 2.2.2, 2.5.2.1.
 35. UNCLOS, art. 2; Chicago Convention, art. 1; *Annotated Supplement*, paras. 2.5.1, 2.5.1.1.
 36. These exceptions are codified in UNCLOS, arts. 108 and 110.
 37. Of note are the four nonsignatories to NPT: Cuba, India, Israel, and Pakistan. The eleven nonsignatories to CWC include Iraq, Kazakhstan, and North Korea.
 38. For discussion of the doctrine, see Michael Akehurst, “Custom as a Source of International Law,” *Sources of International Law*, ed. Martti Koskenniemi (Burlington, Vt.: Ashgate, 2000), pp. 251–303.
 39. P. K. Menon, *The Law of Treaties between States and International Organizations* (Lewiston, N.Y.: Edwin Mellen, 1992), p. 73. The “textual school” of treaty interpretation is generally accepted; *ibid.*, chap. 7.
 40. The thirty nations are: Argentina, Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Russia, Spain, Sweden, Switzerland, Turkey,

Ukraine, the United Kingdom, and the United States.

41. Brazil, Iceland, and South Africa signed MTCR but not WA. Bulgaria, Romania, and the Slovak Republic signed WA but not MTCR.
42. Guy Thomas, "A Maritime Traffic-Tracking System: Cornerstone of Maritime Homeland Defense," *Naval War College Review* 56, no. 4 (Autumn 2003), p. 139.
43. Lloyd's Maritime Information Unit lists a hundred thousand vessels of that minimum weight in its "confidential directory," available at www.seaway.co.uk. The U.S. Coast Guard maintains a database of its contacts with vessels in the Port Information State Exchange (PISX), which recognizes over two hundred jurisdictions for which a vessel may be flagged; see cgmix.uscg.mil/pisx/pisx/psix2.
44. Naval War College, *U.S. Navy Capabilities Brief*, CD-ROM (Newport, R.I.: Joint Military Operations Dept., 2002). Five of the sixteen superports are within the United States, and three are in Europe. Others are located in China, Hong Kong, India, Japan, Singapore, South Korea, and Taiwan. The choke points are the Panama Canal, English Channel, Strait of Gibraltar, Dardanelles, Suez Canal, Strait of Hormuz, Straits of Malacca, Taiwan Strait, and Tsushima Strait.
45. "American intelligence officials failed to detect that Iraq's unconventional weapons programs were in a state of disarray." James Risen, "CIA Lacked Iraq Arms Data, Ex-Inspector Says," *New York Times*, 26 January 2004, p. 1. Underestimating the maturity of WMD programs is also a risk. In the summer of 2003, North Korea "surprised" the world with more advanced ballistic missile and nuclear capabilities than it had been previously believed to possess.
46. Central Intelligence Agency, *Terrorist CBRN: Materials and Effects*, 17 December 2003, p. 5, available at www.cia.gov/cia/reports/terrorist_cbrn, discusses possible locations of radioactive materials. The figure of twenty-two thousand is from James Fitzsimonds, "Weapons of Mass Destruction" (unpublished paper, Naval War College, Newport, R.I., 2000), p. 16.
47. *Joint Doctrine for Military Operations Other than War*, Joint Pub 3-07 (Washington, D.C.: Joint Staff, 16 June 1995), p. III-3.
48. U.S. State Dept., *United States Initiatives to Prevent Proliferation* (Washington, D.C.: Bureau of Nonproliferation, 24 May 2005), p. 5, available at www.state.gov.
49. See table 2 and the discussion above.
50. NSCT, p. 22.
51. "Reasonable grounds" is the legal standard for a visit and search, per article 110 of UNCLOS.
52. Naval War College, *U.S. Navy Capabilities Brief*, CD-ROM (Newport, R.I.: Joint Military Operations Dept., 2004).
53. Dirty bombs, or "radiological dispersal devices" (RDD), could be as small as a backpack, potentially requiring VBSS teams to conduct a very thorough search (CIA, *Terrorist CBRN*, p. 5). Chemical weapons usually "require bulk application," but some biological weapons need only "ten grams" to accomplish the same effect. Compare Stephen Rose, "Soft Weapons and Hard Choices" (unpublished research paper, Naval War College, Newport, R.I., 1989), p. 6, with Guy Roberts, "The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," *Denver Journal of International Law and Policy* 27 (1999), pp. 493-94 and note 49.
54. As table 1 shows, the thirteen NATO nations that are also PSI participants are Canada, Denmark, France (treaty signatory only), Germany, Italy, Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, and the United States.
55. The 9/11 Commission specifically recognized the advantages of using these features of NATO infrastructure: "The PSI can be more effective if it uses the intelligence and planning resources of the NATO alliance." National Commission on Terrorist Attacks upon the United States, *9/11 Commission Report* (New York: W. W. Norton, 2004), p. 381, available at www.9-11commission.gov/report/911Report.pdf.
56. This will simplify information assurance, permitting combatant commanders to use the NATO standardization agreement "as a basis

- for establishing rules and policies for conducting joint intelligence operations" (*Doctrine for Intelligence Support to Joint Operations*, Joint Pub 2-0 [Washington, D.C.: Joint Staff, 9 March 2000], p. vii). "The appropriate U.S. geographic combatant commander should issue clearly stated guidelines for the release of classified U.S. information to the MNF (Multi-National Force)" (*Joint Doctrine for Multinational Operations*, Joint Pub 3-16 [Washington, D.C.: Joint Staff, 5 April 2000], p. IV-3). The instruction also provides that guidelines will be "based on existing policy directives and any applicable approved exceptions to the national disclosure policy. These guidelines should be issued to U.S. participants only and should be specific enough to allow implementation down to the tactical level" (Joint Pub 3-16).
57. U.S. State Dept., *The Proliferation Security Initiative (PSI): Second Anniversary* (Washington, D.C.: Bureau of Nonproliferation, 26 May 2005), available at www.state.gov.
 58. Actual execution of an MIO embraces several legal issues: the conduct of the physical search, diversion of the suspect vessel so that a proper or safe search may be done, detention of persons interfering with the search, and use of force by the VBSS. If the VBSS is successful in locating WMD or terrorists, additional issues arise: What is to be done with captured WMD materials? Where will persons be detained, and to what authorities will they be handed over? What sort of prosecution and due process must be guaranteed for them? These concerns are beyond the scope of this article. However, they are all valid and will arise during operations; exercises in which policy, doctrine, and procedures can be developed would be beneficial.
 59. As OEF demonstrated, secure communications for all naval coalition participants are needed (Phil Wisecup and Tom Williams, "Enduring Freedom: Making Coalition Naval Warfare Work," U.S. Naval Institute *Proceedings* [September 2002], p. 52). In August 2003, USS *Enterprise* and its battle group deployed with an Argentine vessel (Dorsey, "Navy Developing Plans to Deploy, Train Overseas with Foreign Fleets").
 60. U.S. Coast Guard, *Fact Card on Maritime Safety and Security Teams*, 23 January 2004, www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/MSST.htm.
 61. U.S. State Dept., *Fact Sheet: International Law Enforcement Academies* (Washington, D.C.: Bureau for International Narcotics and Law Enforcement Affairs, 7 May 2004), available at www.state.gov/g/inl/rls/fs/20280pf.htm.
 62. UN Charter, arts. 41 and 42, respectively.
 63. *9/11 Commission Report*, pp. 365–67.
 64. "PSI membership should be open to non-NATO countries. Russia and China should be encouraged to participate." *Ibid.*, p. 381.
 65. Historic examples of such pairing are: UNSCR 661, 665 (1990) sanctions against Iraq after its invasion of Kuwait; UNSCR 713 (1991), p. 757 (1992) weapons against FRY after fighting began. It is a matter of debate whether separate UNSCR authority is required to implement an embargo with military force, or whether MIO authorization should be implied by the embargo authorization. See Richard Zeigler, "Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Intercept Operations," *Naval Law Review* 43 (1996), pp. 27–31, and Jane G. Dalton, "The Influence of Law on Seapower in Desert Shield/Desert Storm," *Naval Law Review* 41 (1993), pp. 34–45.
 66. UNSCR 1540, para. 1, available at www.un.org/Docs/sc/unscl_resolutions04.html and www.state.gov/p/io/rls/fs/2004/31963pf.htm.
 67. Representatives who spoke in favor of UNSCR 1540 after the unanimous vote were: Algeria, Brazil, Chile, China, France, Germany, Pakistan, Philippines, Romania, the Russian Federation, Spain, the United Kingdom, and the United States. Six whose rationales included closing a "gap" in international law were: cosponsor France, Pakistan, Chile, Spain (which used the phrase "legal vacuum"), Romania, and the Philippines.
 68. UNSCR 1540, para. 3(c).
 69. *Ibid.*, quoting paras. 2, 3.
 70. Statement of Interdiction Principles, Interdiction Principle 4.
 71. The North Atlantic Treaty, the Inter-American Treaty of Reciprocal Assistance (Rio Pact), and the Security Treaty between the United

- States and Japan all incorporate Article 51 by reference.
72. Thomas A. Bailey, *Diplomatic History of the United States*, 3rd ed. (New York: Appleton-Century-Crofts, 1946), pp. 204–207.
 73. Ziegler, “Ubi Sumus? Quo Vadimus?” p. 19.
 74. The facts of *Caroline* and its precedential value on this point are noted by Roberts, “The Counterproliferation Self-Help Paradigm,” p. 483 notes 107–108, and discussed in Yoram Dinstein, *War, Aggression and Self-Defense*, 3rd ed. (Cambridge, U.K.: Cambridge Univ. Press, 2001), pp. 218–19.
 75. The United States reported the matter to the Security Council on 22 October 1962: “The Council met even before the Organ of Consultation under the Rio Treaty adopted its resolution of October 23rd and before the proclamation of defensive quarantine was issued or carried into effect.” Leonard Meeker, “Defensive Quarantine and the Law,” *American Journal of International Law* 57 (1963), pp. 515–24, esp. 522.
 76. *Ibid.*
 77. See *ibid.*
 78. *Ibid.*
 79. U.S. President, Proclamation 3504, 23 October 1962, 27 *Federal Register* 10401, reprinted in *American Journal of International Law* 57 (1963), p. 512.
 80. Specifically Articles 1(1) and 2(4).
 81. *Annotated Supplement*, art 4.3.2; George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (New York: Columbia Univ. Press, 1998), pp. 151–52; Dinstein, *War, Aggression and Self-Defense*, p. 169. For a contrary view see Wright Quincy, “The Cuban Quarantine,” *American Journal of International Law* 57 (1963), pp. 546–65.
 82. “IDF Seizes PA Weapons Ship,” www.us-israel.org/jsource/Peace/paship.html.
 83. Both incidents were reported by Intellibridge.com, 18 September 2003.
 84. Among these examples are the *Essex* case in 1805, the *Chesapeake* Affair of 1807, and the *Trent* Affair of 1861. See Bailey, *Diplomatic History of the United States*, chaps. 8–9, 21.
 85. Gerald McGinley, “The Achille Lauro Case,” *Legal Responses to International Terrorism: U.S. Procedural Aspects*, ed. M. Cherif Bassiouni (Dordrecht, Neth.: Nijhoff, 1988), pp. 323–25, 351–53.
 86. For discussion, see Timothy L. H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin’s, 1996).
 87. Chairman of the Joint Chiefs of Staff Instruction 3121.01B of 13 June 2005 provides the standing guidance on self-defense, including national self-defense, which may be justified in response to a hostile act or intent toward the United States. Enclosure A defines “national self-defense” in paragraphs 5a, 5b, 5f–5h, and appendix A.
 88. UNCLOS, art. 111, codifies the doctrine of hot pursuit by the coastal nation.
 89. This specifically includes artificial islands, installations and structures with economic purposes, scientific research, and environmental protection within the EEZ. See UNCLOS, arts. 56, 58, and 60, also *Annotated Supplement*, art 2.4.2.
 90. The categories are: piracy, slave trade, unauthorized broadcasting, without nationality, deception regarding nationality (when true nationality is the same as the warship’s), and illegal narcotics trafficking.
 91. See “Chronological List of UNCLOS Ratifiers,” 16 January 2004, www.un.org/Depts/los. The United States has not ratified but follows UNCLOS as a matter of policy.
 92. Compare tables 2 and 3 and their accompanying discussion with UNCLOS support by 145 countries.
 93. Donald A. Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail* (Annapolis, Md.: Naval Institute Press, 1999), pp. 68–82.
 94. 18 USC 1651. Congress has made the Coast Guard the lead maritime agency in the enforcement of customs laws and created specific statutory authority for interdiction to accomplish that mission both “on the high seas and waters subject to the jurisdiction of the United States” (14 USC 20). This separation by the United States of maritime law enforcement from the naval service is unique. Many states, such as Australia, have made law enforcement a naval mission. Others, like Chile, have a law-enforcement specialization

within the naval service. International law considers high-seas interdiction for law enforcement a task of warships; U.S. Coast Guard are “warships” under international law. See UNCLOS, art. 29.

95. Four UNCLOS exception categories are rooted in the historical struggles against piracy, the slave and opium trades, and illegal

broadcasting in ways that illustrate this process. See Suzanne Miers, *Britain and the Ending of the Slave Trade* (New York: Africana, 1975), pp. 3–20, 315–19; “1958 Convention on the High Seas,” art. 22, reprinted in Burdick Brittin and Liselotte Watson, *International Law for Seagoing Officers*, 3rd ed. (Annapolis, Md.: Naval Institute Press, 1973); and *Annotated Supplement*, note 38.